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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 456

FRED DAVIS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit.

REPLY MEMORANDUM FOR PETITIONER.

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FOREWORD.

The Government, with commendable candor, has confessed error as to the judgment on Counts 1, 2 and 3 of the indictment. It suggests, however, that as to the judgment on Count 4, the petition for writ of certiorari should be denied. Under this count petitioner was sentenced to imprisonment for 20 years. (R. 222).

REPLY.

In opposing review by this Court of a part of the judgment referred to above, the Government has ignored completely Question Presented Number 1 (Pet. 2) and Reasons for Granting the Writ on this point (Pet. 10-11).

By the highly prejudicial remark of the Court therein set forth, the defendant was completely deprived of all the benefits of fundamental instructions concerning the presumption of innocence, the burden of proof, the credibility of witnesses, reasonable doubt, and the failure of the defendant to testify in his own behalf.

The Court of Appeals evaded this fundamental question so important to the proper administration of criminal trials under our system. The entire charge was completely destroyed by the erroneous and prejudicial reference by the trial judge to the instructions as "rubber stamp".

This error, compounded as it was by the erroneous instructions upon which error has been confessed, conclusively establishes that the general verdict "guilty as charged in the indictment" (R. 214-215) was arrived at by a completely confused and misled jury.

The jury was not instructed to consider the guilt or innocence of the defendant as to each separate count of the indictment (R. 192-199, but rather, "whether the defendant is or is not guilty as charged in the indictment." (R. 199), (Pet 52).

Concerning the Court's charge, the Government concedes that the errors thereof infected the entire proceeding in stating, "The difficulty we have with the charge as a whole" and "It is impossible to assess the weight given to the presumption by the jury," (Gov. Br. 7).

2. The Government gratuitously states that as to Count 4 the question raised is the validity of the search of petitioner's apartment incident to the arrest of Miss Saunders there. (Gov. Br. 8). This assertion overlooks Question Presented Number 7 (Pet. 4), concerning the arrest and search of the defendant at his store several miles from the apartment. The evidence thereby obtained was a vital part of the Government's case. (R. 141-142, 150-151). The Government ignores this point and petitioner's discussion thereof at Pet. 21. The statement of facts appears at Pet. 6-8.

3. The Government in misapprehending Question Presented Number 8 (Pet. 4), states that "Petitioner complains that the agents did not have a warrant for the arrest of Miss Saunders", (Gov. Br. 8). A mere reading of the Question Presented and Point *IV* of Reasons for Granting the Writ (Pet. 16), will make the Government's understatement quite clear.

The distinction between the case at bar and *Clifton* v. *United States*, 224 F. 2d 329 (C.A. 4), cited by the Government (Gov. Br. 8), is apparent from a comparison of the facts in the two cases. In *Clifton*, the Court said, at page 330:

> "The investigators had just purchased untaxed whiskey from Padgett after *watching him obtain it* from the room which they later searched. The search *did not extend beyond the room* from which the whiskey had come, and no force was used. Under these circumstances, we feel that the search was reasonable." (Emphasis supplied).

Applicable to the case at bar is the statement of the Court in *Clifton* (p. 330) "Of course, as we pointed out in

Henderson v. *United States*, 4 Cir., 12 F.2d 528, 51 A.L.R. 420, the arrest must be more than a mere sham and not merely an excuse for the search."

In *Marron* v. *United States*, 275 U.S. 192, (Gov. Br. 9), a place of business where various offenses against the National Prohibition Act were being committed was involved. Upon entry to the premises to serve a warrant, the agents observed violations of law being committed. This Court approved the arrest and search and seizure upon that basis.

Here, a private dwelling is involved. No warrant of arrest or search was in existence. The original entry was unlawful. Here there was an arrest incident to a search rather than a search incident to an arrest. The search was a night-time search made upon the pretext of the arrest of another person. Here was a general exploratory search of the entire apartment. No crime was committed in the presence of the arresting agents and no emergency was shown to exist.

We urge that the case cited in the petition herein (Pet. 16-21) apply to the factual situation of this case more aptly than those cited by the Government.

CONCLUSION.

We respectfully urge that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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JULIUS LUCIUS ECHELES,
Attorneys for Petitioner.